No. 95-1717

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

DAVID W. LANIER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether, under *Screws* v. *United States*, 325 U.S. 91 (1945), a defendant may be convicted under 18 U.S.C. 242 for the willful violation of a right secured by the Due Process Clause of the Fourteenth Amendment only if this Court has previously held that the right applies in factually similar circumstances.

2. Whether, for purposes of 18 U.S.C. 242, the right secured by the Due Process Clause of the Fourteenth Amendment to be free from a wholly unjustified interference with bodily integrity by a sexual assault by a state official acting under color of law has been "made specific," within the meaning of *Screws* v. *United States*, 325 U.S. 91 (1945).

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OPINIONS BELOW

The panel opinion of the court of appeals (Pet. App. 87a-143a) is reported at 33 F.2d 639. The order of the court of appeals vacating the panel opinion and granting rehearing en banc (Pet. App. 165a-166a) is reported at 43 F.2d 1033. The en banc opinion of the court of appeals (Pet. App. 1a-86a) is reported at 73 F.3d 1380. The order of the district court denying respondent's motion to dismiss the indictment (Pet. App. 144a-156a) is unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on January 23, 1996. The petition for a writ of

certiorari was filed on April 22, 1996, and was granted on June 17, 1996 (J.A. 190). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law."

2. Section 242 of Title 18, United States Code, provides in pertinent part as follows:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States * * * shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section[,] * * * shall be fined under this title or imprisoned not more than ten years, or both[.][1]

STATEMENT

After a jury trial in the United States District Court for the Western District of Tennessee, respondent was convicted on seven counts (two felony counts and five misdemeanor counts) of willfully

[1] When respondent was indicted in this case, prior to the 1994 amendments to Section 242, the statute referred to "any inhabitant of" any State, rather than "any person in" any State. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320201(b), 108 Stat. 2113.

depriving a person of rights and privileges protected and secured by the Constitution and laws of the United States, in violation of 18 U.S.C. 242. He was acquitted on four counts charging violations of Section 242. He was sentenced to a ten-year term of imprisonment on each felony count and a one-year term of imprisonment on each misdemeanor count, to be served consecutively, for a total of 25 years' imprisonment, all to be followed by two years' supervised release. He was also fined $25,000. The court of appeals, on rehearing en banc, reversed all the convictions.

1. Between 1989 and 1991, while he was an elected Chancery Court judge for Dyer and Lake Counties, Tennessee, respondent raped or sexually assaulted five women in his chambers, during the working day. In each instance, the victim was in respondent's chambers in connection with her employment in the court system, the prospect of such employment, or other official business. One of the victims also had a child custody matter before respondent. Respondent was the only chancellor and juvenile court judge in Dyer and Lake counties. Pet. App. 89a. He is a member of a politically prominent family in the area; his grandfather and father were political office holders and, at the time of most of the sexual assaults, his brother was the local district attorney. *Id.* at 34a, 63a; J.A. 134-135. Respondent served for two years as alderman and for 14 years as mayor of Dyersburg, Tennessee, before he was elected judge in 1982. J.A. 135-136. He was re-elected in 1990, and continued to serve in that capacity until he was removed pending the resolution of this case. J.A. 136; Pet. App. 57a.

As Chancery Court Judge, respondent heard divorce cases, probate matters, and boundary disputes.

Although the Circuit Court has concurrent jurisdiction over divorce cases, respondent handled most of such cases in the two counties, including related child custody and support matters. Respondent also had Juvenile Court jurisdiction. He had the power to hire and fire four court employees—his secretary, two juvenile officers, and a secretary in the juvenile office. J.A. 138-140.

2. a. The two felony counts on which respondent was convicted involve incidents of forcible oral rape of Vivian Archie, a childhood friend of respondent's daughter. In 1989, respondent presided over Archie's divorce, and awarded her custody of her daughter, Ashley. In the following year, when Archie was out of work and living with her parents, she learned that a job was available at the courthouse and applied for it. J.A. 47. Respondent interviewed Archie in his chambers. During the meeting, respondent told Archie that her father had recently been to see him, and had told him that he "wanted the judge to take custody away from [her] of * * * Ashley." J.A. 49. Archie became afraid that she was going to lose custody of her daughter, and asked respondent if he was going to take her daughter away from her. Respondent told her that he could not discuss the case. *Ibid.* He then told Archie that he had already promised the courthouse job to someone else. Archie responded that she "would really do anything for a job" so that she could support and keep custody of her daughter. J.A. 50.

When Archie was preparing to leave, she reached across the desk to shake respondent's hand. Respondent grabbed her hand, pulled her around the end of the desk, grabbed her hair and neck, and tried to fondle and kiss her. Although Archie tried to push him away, respondent threw her into a chair and

continued to try to kiss her. He then stood over her, exposed himself, pulled her head down, and squeezed her jaws to make her open her mouth. He then forced his penis in her mouth and repeatedly thrust his penis into her mouth until he ejaculated. Pet. App. 94a-95a. Archie did not report the assault to anyone, including her family, because she was afraid that respondent would take custody of her child away from her. She was afraid no one would believe her, since respondent "had all of this power. He could do anything he wanted to do." J.A. 51. She also believed that, since "[h]e was the judge, * * * [n]obody would listen and [she] would look like a fool." J.A. 52. Archie did not report the incident to the county prosecutor because he was respondent's brother. *Ibid.*

A few weeks later, respondent telephoned Archie's home and left a message that he had a job for her, but that she would have to come to his chambers to get the information. At her mother's insistence, Archie called back. Although Archie repeatedly asked respondent to give her the location of the job interview over the telephone, he insisted that she return to his chambers for the information. Archie went back to respondent's chambers, fearing that, if she did not, her parents would be angry that she was not trying to get a job, respondent would conclude that she had told her parents about the assault, and he would retaliate by taking her daughter away. J.A. 54-55.

While Archie was in respondent's chambers, he told her about a possible secretarial position available with a friend. As they were talking, respondent walked around his desk towards her. Archie began backing out toward the door, but he came up to her, slammed the door shut, and started trying to kiss her. She told him to stop and tried to push him away, but

he pulled her hair and pushed her into a chair. Respondent then exposed himself, and again forced her to open her mouth and perform oral sex, and ejaculated in her mouth. During the assault, Archie was crying, gagging, choking, and having trouble breathing. Pet. App. 63-64a.

As with the first assault, Archie did not report the second incident because she was afraid that respondent would retaliate by taking away her child. When she subsequently met respondent, he asked her whether she had "said anything" or "told anyone." He also asked "how her family life was going," a remark she interpreted as a threat to take away custody if she reported the assaults. J.A. 57-58.

b. The five misdemeanors involve respondent's sexual assaults on four other women. In 1989, respondent assaulted Sandra Sanders, whom he had hired to supervise the Youth Service Office of the Dyer County Juvenile Court. As part of her job, Sanders was required to attend weekly meetings with respondent in his chambers. During one of those meetings, respondent grabbed Sanders' breast. Sanders tried to remove his hand; she then stood up and walked out of his office. J.A. 15-17. Later, after a court session, respondent grabbed Sanders' buttocks. J.A. 18. He also, at a later meeting, pinned Sanders to the wall and kissed her on the lips. J.A. 18-19. Sanders did not report the incidents, because she thought that respondent had "so much influence in Dyersburg" that no one would believe her word over that of a judge (J.A. 22), but she did finally confront respondent and demand an apology. J.A. 19-20. Although respondent apologized, he began to find minor faults with the quality of her work, and eventually he demoted her. J.A. 21.

Respondents hired Patty Mahoney as his secretary in the autumn of 1990. She was recently divorced and had two young children to support. Within a day after she began the job, respondent began to touch her breasts and buttocks. He "hug[ged]" or "touch[ed]" her every day. J.A. 70. He soon became more aggressive and squeezed Mahoney's breast. J.A. 71. One day, Mahoney broke down crying, and told respondent that she needed the job and wanted him to leave her alone. He reacted by putting his arms around her, picking her off the floor, and aggressively hugging her. He also slid her down his body and ground his pelvis against her. Pet. App. 93a. When Mahoney told respondent that she could run out of the chambers screaming, he said, "I don't think you will do that because it would hurt you more than it would hurt me." J.A. 72. Mahoney quit the job after only two weeks because "it became clear to [her] that he was not going to leave [her] alone." J.A. 70. She did not report the incidents because she knew "the Laniers * * * had always been in power," and she was afraid that no one would hire her if she reported respondent's behavior. J.A. 72.

In March, 1991, respondent sexually assaulted another of his secretaries, Sandy Attaway. After her first month of work, respondent began to make sexual remarks to her. He asked Attaway twice if she were afraid of him; when she responded (falsely) that she was not, he told her that "he was a judge, and everyone should be afraid of him." J.A. 32. One day, while wearing his judicial robe in his chambers, respondent walked behind Attaway, put his arms around her, and "pushed his pelvic area into [her] rear end and began grinding into [her]" with his erect penis. J.A. 30. Attaway did not quit because she

needed the job, but three months later, respondent fired her anyway, telling her that "things just weren't working out" between the two. J.A. 35. He subsequently told her that they "would have gotten along fine" if she had liked oral sex. J.A. 37.

In the Fall of 1991, respondent sexually assaulted Fonda Bandy, the local site coordinator for a federal program called "Drug Free Public Housing." The two were meeting in respondent's chambers concerning Bandy's proposal to implement parenting classes for parents in public housing who had children in juvenile court (over which respondent presided). J.A. 90-92. After Bandy finished her presentation, respondent put his arms around her, kissed her, firmly pulled her up to him, and fondled her breasts. When she tried to escape, he reached out and put his hand on her crotch. Pet. App. 99a-100a. Respondent told Bandy that, if she came back to see him, she would have all the clients she needed; she never returned, and he never sent her clients. J.A. 95. Bandy did not report the incident because respondent was "a very political person" and knew "a lot of important people." J.A. 105.

3. Respondent was indicted on 11 counts of violating 18 U.S.C. 242. Each count alleged that respondent had willfully subjected another person "to the deprivation of rights and privileges which are secured and protected by the Constitution, and the laws of the United States, namely, the right not to be deprived of liberty without due process of law, including the right to be free from willful[] sexual assault." J.A. 6-12. The district court dismissed one count at trial.[2]

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[2] Before trial, respondent moved to dismiss the indictment on the ground that Section 242 is void for vagueness. That motion did not assert that respondent's alleged conduct did not violate a constitutional right. The trial court denied the motion, noting that this Court upheld the statute against a vagueness challenge in *Screws* v. *United States*, 325 U.S. 91 (1945). See Pet. App. 145a-147a. The court also stated that "[a]lthough the issue has not been raised, it is clear that existing law recognizes one's constitutional right to be free of coerced sexual acts such as intercourse or oral sex." *Id.* at 146a n.4.

After the government rested at trial, respondent moved for a judgment of acquittal on all counts, arguing, in part, that "no federal crime [had been] proved by the government." J.A. 110. That argument was based on the requirement of Section 242 that the conduct have occurred "under color of law," not on the contention that the government had not shown the deprivation of a constitutional right. *Ibid.* Respondent acknowledged that, except as to Count 9 (which alleged that, when he met with a woman in his chambers about her case, he exposed his genitals to her), he was "not alleging that there has been no deprivation of constitutional rights shown. I am satisfied that a deprivation of freedom on liberty from sexual assault is adequate." *Ibid.* The court denied the motion for acquittal at that time, Tr. 6-1000, but subsequently dismissed Count 9, Tr. 10-1738.

In its instructions to the jury, the court explained that respondent was charged in each count with depriving another person of the right "not to be deprived of liberty without due process of law, specifically [the] right to be free from willful sexual assault." J.A. 186. The court charged that, included in the liberty protected by the Fourteenth Amendment "is the concept of personal bodily integrity and the right to be free of unauthorized and unlawful physical abuse by state intrusion." *Ibid.* It also instructed that the Due Process Clause protects against physical abuse when the conduct "is so demeaning and harmful under all the circumstances as to shock one's consci[ence]." *Ibid.* And it cautioned

the jury that not "every unjustified touching or grabbing by a state official * * * constitutes a violation of a person's constitutional rights. The physical abuse must be of a serious substantial nature that involves physical force, mental * * * coercion, bodily injury or emotional damage which is shocking to one's consci[ence]." J.A. 186-187. Respondent did not object to those instructions. J.A. 189.

The jury returned verdicts of guilty on seven counts, and not guilty on three counts. With respect to the two counts involving the forcible oral rape of Vivian Archie, the jury found that Archie had suffered "bodily injury" from those assaults, which, under the text of Section 242, made respondent eligible for a maximum term of ten years' imprisonment on each of those counts. See Pet. App. 109a-111a. The court sentenced respondent to a ten-year prison term on each of those counts, and to the maximum one-year prison term available for each of the other counts, to be served consecutively, for a total term of 25 years' imprisonment, and all to be followed by two years' supervised release. *Id.* at 159a.

4. a. A unanimous panel of the court of appeals affirmed the convictions and sentence. Pet. App. 87a-143a.[3] On rehearing, however, a divided en banc court

[3] The panel, rejecting respondent's contention that he had not deprived his victims of a constitutional right, concluded that "the government established that [respondent] violated the victims' constitutional right; namely, their right to bodily integrity. Further, the right to bodily integrity has been defined and made specific by court decision." Pet. App. 104a. "It is settled now," the panel continued, "that the Constitution places limits on a State's right to interfere with a person's . . . bodily integrity." *Ibid.* The panel also rejected respondent's contentions that he had not acted intentionally to deprive his victims of their constitutional rights, and that he had not acted under color of law. *Id.* at 106a-107a. With respect to the latter point, the panel noted that "all of the assaults took place in [respondent's] chambers during working hours, * * * during each assault there was at least an aura of official authority and power, [and] * * * there was evidence that [respondent] used his position to intimidate his victims into silence." *Id.* at 108a.

reversed and instructed the district court to dismiss the indictment. *Id.* at 1a-32a. Two of the 15 judges on the en banc court concurred in part and dissented in part. *Id.* at 33a-41a, 42a-49a. Four judges dissented. *Id.* at 47a-50a, 50a-56a, 57a-86a.

The majority opinion (Pet. App. 1a-33a) initially framed the question as whether "the sexual harassment and assault of state judicial employees and litigants by the judge violates" Section 242. Pet. App. 3a. The majority noted that Section 242 "does not specifically mention or contemplate sex crimes," *ibid.*, and "by its terms criminalizes violations of 'constitutional rights' only in the abstract, not conduct which is described specifically by federal or state statute," *id.* at 4a. It also noted the "fundamental principle limiting the judicial power to extend criminal statutes by interpretation," *ibid.*, since "[n]o matter how outrageous a defendant's actions may be, he has to be charged with the appropriate offense created by Federal law," *id.* at 5a.

The majority then concluded that sexual assault by a state actor is not punishable under Section 242 as a willful violation of rights protected by the Due Process Clause. It rejected the government's argument that, for purposes of Section 242, freedom from sexual assault by a state agent is part of a "general constitutional right against interference with 'bodily integrity' in a way that 'shocks the conscience.'"

Pet. App. 17a. "Conditioning the right on whether the particular acts of a defendant 'shock the conscience' leaves the definition of the crime up in the air * * * [and] requires [jurors] to make an essentially arbitrary judgment. 'Shocks the conscience' is too indefinite to give notice of a crime" and "will yield results that depend too heavily on factual particularity of an individual set of events and upon biases and opinions of individual jurors." *Id.* at 19a-20a.

The court then addressed *Screws* v. *United States*, 325 U.S. 91 (1945), in which this Court rejected a challenge to Section 242 as void for vagueness. In *Screws*, a plurality of the Court stated that a defendant can know with sufficient definiteness "the range of rights that are constitutional" and are therefore protected from violation under Section 242 because that Section requires a specific intent to deprive a person of a right that has been "made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." 325 U.S. at 104. Based on that language in *Screws*, the majority of the en banc court concluded that "the right not to be assaulted" had not been "made specific" because "it is not publicly known or understood that this right rises to the level of a 'constitutional right.' It has not been declared as such by the Supreme Court. It is not a right listed in the Constitution, nor is it a well-established right of procedural due process like the right to be tried before being punished." Pet. App. 28a.

The government had argued that the right under the Due Process Clause to be free from sexual assault by state officials (and indeed from unjustified brutal official assault generally) was well established by lower-court decisions. See Gov't En Banc C.A. Br.

7-10. The en banc court held, however, that such lower-court decisions are insufficient to support conviction under Section 242. "Only a Supreme Court decision with nationwide application can identify and make specific a right that can result in § 242 liability." Pet. App. 28a-29a.

The court also read *Screws* to require, for a conviction under Section 242 for the violation of a constitutional right protected by the Due Process Clause, that this Court "must not only enunciate the existence of [that] right, it must also hold that the right applies to a factual situation fundamentally similar to the one at bar." Pet. App. 29a. Thus, the majority stated, "[i]f the [Supreme] Court enunciates a right, but leaves some doubt or ambiguity as to whether that right will apply to a particular factual situation, the right has not been 'made specific' as is required under *Screws*." *Id.* at 29a-30a. It also remarked that "[t]he 'make specific' standard is substantially higher than the 'clearly established' standard used to judge qualified immunity in section 1983 civil cases." *Id.* at 30a. Applying that standard, the majority concluded that "sexual assaults may not be prosecuted as violations of a constitutional substantive due process right to bodily integrity," *id.* at 31a, and it ordered dismissal of the indictment, *id.* at 32a.

b. Judges Wellford and Nelson wrote separate opinions concurring in part and dissenting in part. Both concluded that the conduct underlying the misdemeanor counts did not reach the level of a constitutional violation, but both also concluded that the forcible oral rapes of Vivian Archie did reach that level, and that the rapes could be punished under Section 242 as violations of a constitutional right that had been made specific. Pet. App. 33a-41a, 42a-46a.

c. Judge Daughtrey wrote the principal dissenting opinion. Pet. App. 57a-86a.[4] She disagreed with the majority's reading of *Screws* as requiring Supreme Court decisions squarely on point to support a conviction under Section 242. She noted that, in discussing the problem of notice to the defendant, *Screws* adverted to the need for "*decisions* interpreting [the Constitution]," not only "*Supreme Court decisions* providing such interpretations," and that *Screws* referred to "the decisions of *the courts*" as a "source of reference for ascertaining the specific content of the scope of due process." Pet. App. 73a-74a. She stressed that problems of notice to the defendant were absent here, because, even if this Court had not delivered a decision directly on point, "all federal courts addressing analogous situations have accepted the long-standing existence and viability of a right to freedom from interference with bodily integrity." *Id.* at 74a.

"Even more troubling," Judge Daughtrey remarked, was that the majority had "reject[ed] or ignore[d]" Supreme Court decisions recognizing "a constitutional right to bodily integrity." Pet. App. 74a (citing *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), *Cruzan* v. *Missouri Dep't of Health*, 497 U.S. 261 (1990), *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), and *Ingraham* v. *Wright*, 430 U.S. 651 (1977)). Although those decisions "do not specifically mention sexual assaults upon individuals under color of law, * * * logical interpretations of existing law cannot be ignored by the courts simply because *factually*

[4] Judge Daughtrey's dissent was joined in full by Judges Keith and Moore. Judge Keith wrote a separate dissent (Pet. App. 47a-49a), and Judge Jones also dissented (*id.* at 50a-56a).

similar cases are not present[]." Pet. App. 74a-75a. Indeed, Judge Daughtrey noted:

> The easiest cases don't even arise. There has never been [,for example,] a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in such circumstances.

Ibid. (citation omitted). "Likewise," she concluded, "this is the 'easy' case that demonstrates a blatant violation of those Supreme Court and court of appeals precedents that had 'made specific' the fact that interference with personal security and bodily integrity that shocks the conscience is proscribed by the substantive due process principles of the Fourteenth Amendment." *Ibid.*

SUMMARY OF ARGUMENT

I. The court of appeals erred in concluding that the willful violation of a constitutional right may not be punished under 18 U.S.C. 242 unless this Court has previously recognized and applied that right in a factually similar case. That reading of Section 242 is not supported by *Screws* v. *United States*, 325 U.S. 91 (1945). In *Screws*, the Court held that Section 242's element of willfulness requires a specific intent "to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." 325 U.S. at 104. *Screws* did not hold that a prior decision of this Court on all fours is required for conviction under Section 242. This Court has, in fact, approved the use of the Recon-

struction Era criminal civil rights statutes to prosecute violations of constitutional rights even when those rights had not been previously recognized to be applicable in closely similar factual circumstances.

Screws' interpretation of the element of willfulness in Section 242 is grounded in concerns of notice. *Screws* sought to ensure that officials charged with enforcing facially valid local laws do not learn to their surprise that their conduct is prohibited by the Due Process Clause and may therefore be criminal. A prior decision of this Court squarely on point is not necessary to give potential defendants the required fair notice. If this Court has articulated the contours of a constitutional right, public officials have notice that they may not act willfully or recklessly in defiance of that right. Further, public officials are accustomed to consulting decisions of lower courts, as well as of this Court, to determine the legality of their conduct. And because Section 242's element of scienter requires proof that the defendant acted with specific intent to accomplish that which the statute prohibits—that is, with specific intent unjustifiably to invade legally protected interests—it is unlikely that any official will learn to his surprise that his conduct was criminally sanctionable. Thus, a defendant may be convicted under Section 242 for the willful violation of a constitutional right as long as it is clear that the right exists, and the decisional law shows the application of the right to the case at hand.

The court of appeals' insistence on a precedent of this Court on all fours with the prosecution is illogical, for it would prevent the government from prosecuting the most egregious constitutional violations, even when there is broad consensus that the

right exists and applies in a particular case. If the lower courts have reached such a consensus, a decision by this Court would be unlikely and unnecessary. Precisely for that reason, the court of appeals' rule would bar prosecution.

II. Decisions have "made specific," within the meaning of *Screws* v. *United States*, *supra*, that the Due Process Clause protects a constitutional right to bodily integrity, and have also made clear that that right includes the right to be free from wholly unjustified sexual assaults by state officials acting under color of law. The right to bodily integrity was recognized at common law, and has been recognized as protected by the Due Process Clause in a series of decisions of this Court dating back at least to *Rochin* v. *California*, 342 U.S. 165 (1952), and *Ingraham* v. *Wright*, 430 U.S. 651 (1977). Numerous decisions of the lower courts have elaborated upon that right to the point where it is clear beyond all doubt that an intentional sexual assault by a state official, lacking any conceivable justification, is a deprivation of liberty without due process of law, and therefore may be prosecuted under Section 242 as a willful violation of rights protected by the Constitution.

The court of appeals believed that a violation of the right to bodily integrity could not be punished under Section 242 because the government would have to show that the defendant's conduct "shocked the conscience" (which standard it found to be insufficiently precise for a criminal prosecution). That concern was mistaken; in a case like the present one, in which there is no conceivable justification for the official defendant's deliberate and serious intrusion on bodily integrity, the intrusion deprives the victim of liberty without due process. The "shock the con-

science" instruction given by the trial court was in fact to respondent's benefit, and in any event it was not insufficiently precise to guide the jury's discretion.

ARGUMENT

I. THE WILLFUL VIOLATION OF A RIGHT PROTECTED BY THE DUE PROCESS CLAUSE MAY BE PUNISHED UNDER 18 U.S.C. 242 WITHOUT A PRIOR DECISION OF THIS COURT APPLYING THE RIGHT IN A FACTUALLY SIMILAR CASE

For decades, Section 242 of Title 18, United States Code, has been the primary tool for bringing to justice state officials who engage in the most egregious violations of constitutional rights, including rapes, beatings, and other unjustified assaults committed under color of law.[5] The court of appeals concluded, however, that under *Screws* v. *United States*, 325 U.S. 91 (1945), the willful violation of a right protected by the Due Process Clause of the Fourteenth Amendment may not be punished under Section 242 unless this Court has previously held "that the right applies to a factual situation fundamentally similar to the [case] at bar." Pet. App. 29a. That decision is contrary to this Court's precedents, unsupported by the reasoning of *Screws*, and illogical. If sustained, it would also be profoundly damaging to the national

[5] Section 242 has long been construed to punish the violations of all constitutional rights, including all rights protected by the Fourteenth Amendment. See *United States* v. *Price*, 383 U.S. 787, 793 (1966); *Williams* v. *United States*, 341 U.S. 97, 100 (1951); *Screws* v. *United States*, 325 U.S. 91, 98-100 (1945).

government's ability to protect its citizens from the most serious abuses of power by state officials.[6]

1. In *Screws*, the Court directly addressed the concern expressed by the court of appeals in this case—that, given the "broad and fluid definitions of due process" (325 U.S. at 95), a state official might be prosecuted under Section 242[7] for violating a constitutional right that he or she could not have known existed. See 325 U.S. at 95-97. The Court rejected the argument that the statute is unconstitutionally vague when applied to rights protected by the Due Process Clause, for it found that a narrowing construction of the Act refuted any concern that "the accused [could] be said to suffer from lack of warning or knowledge that the act which he does is a violation of law." *Id.* at 102. Specifically, the Court held that,

[6] Approximately 30 cases are prosecuted by the Department of Justice under Section 242 each year. Most involve brutal assaults by persons acting under color of law. Many are based on the Due Process Clause right to bodily integrity, because they arise out of situations, such as beatings of pretrial detainees, where the Fourth and Eighth Amendments do not apply. See *Graham* v. *Connor*, 490 U.S. 386, 392 n.6, 395 n.10 (1989). Since 1981, the Civil Rights Division of the Department of Justice has prosecuted at least 29 Section 242 cases involving sexual assaults by public officials; more than half of those cases were brought in the last five years. Typically, the victim in those cases is a woman who has been sexually assaulted by a jailor, police officer, or border patrol agent. Three cases, in addition to this case, involved sexual assaults by state judges; two of those cases resulted in guilty pleas, the other in acquittal.

[7] Section 242 (18 U.S.C.) and its companion conspiracy statute, 18 U.S.C. 241, have been renumbered several times. For simplicity, we generally refer to them herein by their current section numbers in Title 18 of the United States Code.

when Congress made only "willful" deprivations of constitutional rights subject to criminal punishment under the statute, it punished only acts "knowingly done with the purpose of doing that which the statute prohibits." *Ibid.* The Court described the specific intent required by Section 242 as "an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." *Id.* at 104. Under that construction, "the claim that the section lacks an ascertainable standard of guilt must fail," for the articulation of a constitutional right by the courts gives fair warning that an intentional deprivation of that right may be punished. *Id.* at 103-104.[8]

Screws therefore interpreted Section 242 as containing two related protections that, together, preclude any argument that the statute fails to give fair warning of the acts it prohibits. The first safeguard is that the Act's element of willfulness requires an "evil motive to accomplish that which the statute condemns." 325 U.S. at 101. "[T]he punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits." *Id.* at 102. Section 242 thus applies only when the defendant understands that he is unjustifiably invading a legally protected interest. Because one who acts with the specific intent required by the Act

[8] Although only four Justices joined the plurality opinion in *Screws*, that opinion has been taken in later cases as the opinion of the Court. See *United States* v. *Guest*, 383 U.S. 745, 753-754 (1966); *Price*, 383 U.S. at 793. The Court has also held that the same standard of specific intent applies to Section 242's companion conspiracy statute, 18 U.S.C. 241. See *Guest*, 383 U.S. at 753-754; *Price*, 383 U.S. at 806 n.20.

"is aware that what he does is precisely that which the statute forbids[,] [h]e is under no necessity of guessing whether the statute applies to him[,] * * * for he either knows or acts in reckless disregard of its prohibition of the deprivation of a defined constitutional" right. *Id.* at 104.[9]

[9] It is not necessary to a conviction, however, that the defendant have been "thinking in constitutional terms," as long as his "aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution." 325 U.S. at 106. Therefore, in a prosecution under Section 241 or 242, it need not be shown that the defendant "actually knew that it was a Constitutional right that [he was] violating or conspiring against." *United States* v. *O'Dell*, 462 F.2d 224, 232 n.10 (6th Cir. 1972). "[T]he specific intent required to violate section [242] is the purpose * * * to commit acts which deprive a [person] of interests in fact protected by clearly defined constitutional rights." *United States* v. *Ehrlichman*, 546 F.2d 910, 922 (D.C. Cir. 1976). The question that must be asked is whether "the defendant commit[ted] the act in question with the particular purpose of depriving the * * * victim of his enjoyment of the interests protected by [the] federal right." *Id.* at 921. In short, the defendant must "intend[] to accomplish that which the Constitution forbids." *United States* v. *Koon*, 34 F.3d 1416, 1449 (9th Cir. 1994), rev'd in part on other grounds, 116 S. Ct. 2035 (1996). The court of appeals panel correctly applied those standards and concluded that the proof established that respondent had acted willfully. Pet. App. 107a.

The en banc majority erred, however, in relying on its conclusion that the "literate public" does not specifically perceive the right to be free from sexual assault by state officials acting under color of law as a constitutional right. See Pet. App. 28a. We disagree with the court of appeals' understanding of public perception, but even if we put that point aside, the more fundamental point is that, under *Screws*, a defendant need not be specifically thinking "in constitutional terms" to violate Section 242. It is sufficient for conviction if (as here) the de-

The second safeguard is the requirement that the right in question have been previously "made specific" by a source of legal authority. In adopting that requirement, the Court stated that, without that construction, a law enforcement official might be convicted "if he does an act which some court later holds deprives a person of due process of law." 325 U.S. at 97. *Screws* therefore required, not only that the defendant have the specific intent to violate a constitutional right, but also that the right have been "made definite by decision or other rule of law." *Id.* at 103.

2. *Screws* refers to "decisions" interpreting the Constitution or laws; it does not limit the scope of Section 242 to the violation of rights that this Court has previously recognized as applying in a factually similar case. Indeed, that reading of *Screws* by the court of appeals cannot be squared with decisions of this Court in which the Court permitted prosecutions for violations of constitutional rights, even though the Court had not previously applied or recognized those rights in factually similar circumstances.

In *United States* v. *Guest*, 383 U.S. 745 (1966), for example, the Court held that private defendants could be prosecuted under Section 242's companion conspiracy statute, 18 U.S.C. 241, for conspiring to intimidate citizens from exercising their constitutional right to interstate travel. 383 U.S. at 757-760. The Court stated in *Guest* that the constitutional right to

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fendant understands that he is violating legally protected interests that are in fact protected by the Constitution—a point the court of appeals did not doubt in this case. See Pet. App. 28a ("The defendant certainly knew his conduct violated the law.").

interstate travel had been "firmly established and repeatedly recognized" in prior decisions. *Id.* at 757. Yet it was in *Guest* itself that the Court held, for the first time, that the right to travel included a right to be free from *private* interference with interstate travel—as the Court noted, *id.* at 759-760 n.17, and the dissent emphasized, *id.* at 766-767. Previously the Court had held only that the Constitution prohibited "governmental interference with the right of free interstate travel." See *id.* at 759 n.17. Some of the Court's prior decisions had in fact indicated that private interference with interstate travel was not addressed by the Constitution (as the government's brief in *Guest* acknowledged).[10] Nonetheless, the Court concluded that the reasoning in its prior interstate-travel decisions "fully support[ed] the conclusion" that the constitutional right was secured against private as well as governmental interference, *id.* at 760 n.17—even while noting that, under *Screws*, a "specific intent to interfere with the federal right must be proved," *id.* at 760. The Court found no conflict between *Screws* and its decision in *Guest* to apply the right to interstate travel to include freedom from private interference and simultaneously to permit a prosecution for a violation of that right.

Similarly, in *United States* v. *Classic*, 313 U.S. 299 (1941), the Court rejected a challenge to an indictment brought under the predecessors to Sections 241 and 242, charging the defendants with willfully al-

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[10] See U.S. Br. at 55, *United States* v. *Guest*, 383 U.S. 745 (1966) (No. 65) (stating that language in *United States* v. *Wheeler*, 254 U.S. 281 (1920), discussing the right to interstate travel "was not necessary to the decision and * * * should not be followed").

tering and falsifying ballots in a Democratic party primary election held to nominate a candidate for a congressional election. The Court held in *Classic*, for the first time, that the federally protected right to vote in congressional elections includes "the right of the elector to have his ballot counted at the primary." 313 U.S. at 318. It also held that willful violations of that right could be prosecuted under the Reconstruction Era statutes, even though one of its previous decisions had expressly reserved judgment on the question whether the constitutional right to vote extended to primary elections, and a plurality of the Court in another case had stated that it did not. See *id.* at 317. The Court rejected the dissent's argument that, since Congress's intent to cover primary voting was "none too clear," the criminal statutes should be construed narrowly so as to reach only "the rights plainly and directly guaranteed by the Constitution." *Id.* at 334. Rather, the Court concluded that the right had been declared with sufficient specificity for prosecution to be warranted, even if the case then before it involved a violation of the right not previously encountered by the Court:

> Differences of opinion have arisen as to the effect of the primary in particular cases on the choice of representatives. But we are troubled by no such doubt here. Hence, the right to participate through the primary in the choice of representatives in Congress—a right clearly secured by the Constitution—is within the words and purpose of [the statute] in the same manner and to the same extent as the right to vote at the general election. * * * It is no extension of the criminal statute * * * to find a violation of it in a new method of

> interference with the right which its words protect. For it is the constitutional right, regardless of the method of interference, which is the subject of the statute and which in precise terms it protects from injury and oppression.

Id. at 323-324.[11]

3. a. The reasoning of *Screws* does not support the court of appeals' decision that a prior Supreme Court decision directly on point is required in order to make a right sufficiently specific to permit a conviction under Section 242. Such a requirement is far more onerous than necessary to address the concerns of fair notice raised in *Screws*, and would seriously impair the government's ability to prosecute the most serious violations of constitutional rights.

A principal concern of *Screws* is notice to the defendant. Without a limiting construction of Section 242, the Court stated, "[t]hose who enforce local law today might not know for many months (and meanwhile

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[11] *Classic* was decided before *Screws*, in which the Court definitively construed the element of willfulness in Section 242. The Court made clear in *Screws*, however, that the right to vote in primary elections at issue in *Classic* met the standard of specificity later established in *Screws*. In *Screws*, the Court noted that "[t]he indictment [in *Classic*] was sufficient since it charged a willful failure and refusal of the defendant election officials to count the votes cast," and since "[t]he right so to vote is guaranteed by Art. I, § 2 and § 4 of the Constitution." 325 U.S. at 106. Even though the right to vote in congressional elections had not previously been recognized in the context of primary elections, the "charge [was] adequate since he who alters ballots or without legal justification destroys them would be acting willfully in the sense in which [the statute] uses the term." *Ibid.* See also *id.* at 121-122 (Rutledge, J., concurring in the result) (noting that *Classic* addressed and rejected the claim of unconstitutional vagueness in Sections 241 and 242).

could not find out) whether what they did deprived someone of due process of law." 325 U.S. at 97. A prior decision of this Court applying a constitutional right in closely similar factual circumstances is, however, not necessary to ensure adequate notice to defendants. The requisite notice might be obtained from a number of sources, separately or in combination: from decisions of this Court establishing the contours of a constitutional right so as to show its applicability to the case at hand, even if not actually applying it in factually similar circumstances; from lower-court decisions demonstrating a consensus that the constitutional right exists in similar circumstances; and from the general legal background, if that background is sufficiently clear to show that the "traditions and conscience of our people" (*Screws*, 325 U.S. at 95) require recognition of a constitutional right and its application to the case.

The court of appeals' rule that the right must have been previously applied in a *factually similar case*, in particular, is unrealistic and unnecessary to ensure that potential defendants have notice that their conduct is prohibited by Section 242. Once a constitutional right (such as the right to bodily integrity) has been clearly recognized, public officials are charged with knowing that intentional violations of that legally protected interest may be punished under the law, even if those violations might occur in different factual contexts from the violations already condemned by the courts. A stricter rule would mean that factual distinctions of no consequence would

insulate defendants from criminal liability for intentional violations of constitutional rights.[12]

In the analogous area of qualified immunity to lawsuits brought under 42 U.S.C. 1983, the Court has rejected the suggestion that a right cannot be "clearly established" unless it has been recognized in a closely similar case (much less a closely similar case in this Court): "We do not suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances." *Mit-*

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[12] *Lynch* v. *United States*, 189 F.2d 476 (5th Cir.), cert. denied, 342 U.S. 831 (1951), and *United States* v. *Dise*, 763 F.2d 586 (3d Cir.), cert. denied, 474 U.S. 982 (1985), are examples of cases that might have been decided differently under the court of appeals' rule, and they show the dangers of that rule. In *Lynch*, the Fifth Circuit concluded that the defendant law enforcement officers could be convicted under Section 242 for "hand[ing] over" blacks who had been arrested to members of the Ku Klux Klan, who then beat the arrested men severely. 189 F.2d at 478. The Fifth Circuit relied on *Screws* to sustain the conviction, but *Screws* did not involve "handing over" arrested men to a private mob; it involved a murderous assault by the officers themselves. *Dise* was a prosecution against an employee of an institution for the mentally disabled for beating inmates. The Third Circuit rejected the defendant's contention that he could not be convicted under Section 242 because the incidents took place before *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), in which this Court considered "for the first time the substantive rights of involuntarily committed mentally retarded persons under the Fourteenth Amendment," *id.* at 314. In both cases, the rule adopted by the court of appeals in this case might have compelled reversal of the convictions, because the right involved had not previously been applied by this Court "to a factual situation fundamentally similar to the one at bar."

chell v. *Forsyth*, 472 U.S. 511, 535 n.12 (1985). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, * * * but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987).

Nor is decisional law of *this Court* necessary to give constitutionally sufficient notice to defendants that their actions may violate Section 242. Public officials are accustomed to consulting a wide variety of legal sources to determine the legal constraints on their actions—not just to protect themselves from civil and criminal liability, but also to determine whether a contemplated course of action is permissible within the legal norms already declared by the courts. Indeed, given the relatively small number of cases decided by this Court, the decisions of state and lower federal courts on constitutional issues may be the case law most directly relevant to many aspects of governmental decision-making. Once it is apparent from a consensus of lower-court decisions that a certain course of conduct would be unconstitutional, an official acts at his or her peril if he or she nevertheless embarks on such conduct. Such an official "acts in defiance of announced rules of law." *Screws*, 325 U.S. at 104.[13]

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[13] In the context of qualified immunity under 42 U.S.C. 1983, this Court has not expressly decided whether a decision of this Court is necessary to demonstrate the existence of "clearly established" constitutional rights. See *Mitchell* v. *Forsyth*, 457 U.S. at 818 n.32; *Procunier* v. *Navarette*, 434 U.S. 555, 565 (1978). In *Navarette*, the plaintiff (respondent in this Court) relied on lower-court decisions to argue that the First Amendment rights of state prisoners with respect to outgoing mail had been clearly established. The Court examined those decisions but found them insufficient to establish clearly that prisoners had First Amendment rights in outgoing mail. *Id.* at 563-564. In *Davis* v. *Scherer*, 468 U.S. 183 (1984), both the majority and the partial dissent considered court of appeals precedents in deciding whether the defendants (appellants in this Court) had violated a public employee's constitutional right to a pre-termination hearing. See *id.* at 191-192 (opinion of the Court); *id.* at 203-205 (Brennan, J., concurring in part and dissenting in part).

Thus, when this Court's decisions articulating a constitutional right and lower-court decisions applying that right clearly show that a legal interest (such as the interest in bodily integrity) is protected by the Constitution, a deliberate unjustified violation of that interest by an official acting under color of law may be punished under Section 242. In such circumstances, the defendant is not forced to guess at the actions that the statute makes criminal, and "he hardly may be heard to say that he knew not what he did." *Screws*, 325 U.S. at 105. This case well illustrates that point; although there is no Supreme Court decision on all fours with this case, forcible rape or sexual assault by a state official, using the authority of his office to coerce his victims, clearly invades the constitutional interest in bodily integrity and deprives the official's victims of their liberty without due process. See pp. 35-45, *infra*.

b. The court of appeals also failed to consider the significance of Section 242's requirement of specific intent. In a prosecution under Section 242, the government must prove that the defendant acted inten-

tionally or recklessly to do "that which the statute prohibits." *Screws*, 325 U.S. at 102; see *id.* at 101 ("[a]n evil motive to accomplish that which the statute condemns"). That is, it must be shown that the defendant knew (or recklessly disregarded the likelihood) that his actions would violate another person's legally protected interests.[14] Where such specific intent is proved,

> the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of the law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.

Id. at 102. Because Section 242 requires proof of specific intent, there is consequently no danger that (as the court of appeals feared) a defendant will learn to his surprise that his actions violated a constitutional right.

This Court has in a number of cases addressed the relationship between an intent requirement and the

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[14] In contrast, liability in a civil action brought under 42 U.S.C. 1983 does not require any showing of specific intent, see *Daniel* v. *Williams*, 474 U.S. 327, 329-330 (1986); *Parratt* v. *Taylor*, 451 U.S. 527, 534-535 (1981), although such intent may be relevant to an award of punitive damages, see *Smith* v. *Wade*, 461 U.S. 30 (1983). The requirement of specific intent has been viewed as a high hurdle to successful prosecutions under Section 242. See Harry H. Shapiro, *Limitations in Prosecuting Civil Rights Violations*, 46 Cornell L.Q. 532, 537 (1961); Tom C. Clark, *A Federal Prosecutor Looks at the Civil Rights Statutes*, 47 Columbia L. Rev. 175, 183 (1947).

contention that a statute failed adequately to specify the acts that were made illegal. See *Posters 'N' Things, Ltd.* v. *United States*, 114 S. Ct. 1747, 1754 (1994); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 434-446 (1978); *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499-504 (1982). In *Hoffman Estates*, the Court noted that "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Id.* at 499; see *ibid.* n.14 (citing, *inter alia*, *Screws*). The Court held in that case that scienter requirements in the challenged ordinance made the reach of the statute "sufficiently clear" to satisfy due process. 455 U.S. at 502.

United States Gypsum involved a criminal prosecution of manufacturers for exchanging price information, allegedly in violation of the Sherman Act. The defendants contended that, in light of the Sherman Act's "vague" and "general" standards of liability, it would be unfair to convict them for violating a rule of antitrust law by actions taken before that rule had been established by the courts in a civil case. The Court recognized that the Sherman Act is defined by "open-ended and fact-specific standards like the 'rule of reason,'" and "has been construed to have a 'generality and adaptability comparable to that found to be desirable in constitutional provisions.'" 434 U.S. at 438-439. It held, however, that criminal prosecutions for Sherman Act violations require proof of intent. 438 U.S. at 435. It therefore ruled that the government must show, in a criminal antitrust prosecution, that the defendant acted "with knowledge that the proscribed [anti-competitive] effects would most likely follow" from its actions. *Id.* at 444. As long as

"the defendants are consciously behaving in a way the law prohibits, * * * such conduct is a fitting object of criminal punishment." *Id.* at 445.

Those decisions, along with *Screws* itself, show that a prior decision of this Court in a factually similar case is not necessary to prevent unfairness to a defendant charged with the willful violation of rights protected by the Due Process Clause. Since it must always be shown that the defendant acted with intent to deprive a person of legally protected rights, rather than to enforce a facially valid state law or policy, there is no danger that an innocent state official would learn to his surprise that his conduct can be the subject of a criminal prosecution. "Th[e] requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the [Act]" in these circumstances would be unfair. *Boyce Motor Lines, inc.* v. *United States*, 342 U.S. 337, 342 (1952). See also *United States* v. *Ragen*, 314 U.S. 513, 524 (1942) (rejecting argument that defendant could not be punished for willful tax evasion based on claiming deductions for salaries that were more than "reasonable," since "[a] mind intent upon willful evasion is inconsistent with surprised innocence").

4. The court of appeals' rule is illogical, and would lead to perverse results. In particular, it would lead to the result that the clearest and most obvious violations of constitutional rights could not be prosecuted under Section 242.

Some violations of constitutional rights are so plain that this Court has never been called upon to address them directly; yet, under the court of appeals' decision, the national government could not use the

criminal law in those circumstances to vindicate those civil rights.[15] Under the court of appeals' decision, even if every federal court of appeals had recognized a right under the Due Process Clause to be protected from rape by a state official acting under color of law, the government nevertheless could not prosecute such rapes under Section 242 if this Court had not also expressly recognized that right on similar facts; the right would not have been "made specific" by "decisions of the courts," under the court of appeals' reading of *Screws*. But if the lower courts were unanimous in finding a due process violation, review by this Court would be both unnecessary and unlikely. Thus, the most outrageous abuses of constitutional rights by state actors would be placed outside the reach of Section 242, precisely because there was broad consensus that those rights were constitutionally protected.

The court of appeals' rule would also lead to the result that members of the general public free from official restraint on their liberty would have less protection against rapes and brutal assaults by state officials than persons who are in custody, such as persons who are being arrested and convicted prisoners. Persons undergoing arrest have the protec-

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[15] Indeed, some constitutional rights are so plainly protected that *no* court has been required to address them in a published decision. As Judge Daughtrey, and before her, Judge Posner, have noted, "[t]he easiest cases don't even arise. There has never been * * * a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances." Pet. App. 75a (quoting *K.H. through Murphy* v. *Morgan*, 914 F.2d 846, 851 (7th Cir. 1990)).

tion of the Fourth Amendment against unreasonable searches and seizures, and convicted prisoners have the protection of the Eighth Amendment against cruel and unusual punishments. Both of those Amendments provide protection against rapes and unjustified beatings by officials.[16] It would be peculiar, to say the least, if persons who are not in custody do not have at least the same protection from rapes and beatings by officials.[17] Yet, even though the government can now plainly prosecute a prison guard for raping a convicted felon, the court of appeals' rule would prevent the government from prosecuting a state official for using his state office to rape a pretrial detainee or a person who is not in custody, merely because this Court has never expressly held that the Due Process Clause of the Fourteenth Amendment prevents state officials from abusing their authority in that fashion.

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[16] See *Graham* v. *Connor*, 490 U.S. 386 (1989); *Whitley* v. *Albers*, 475 U.S. 312 (1986).

[17] The "less protective Eighth Amendment standard" of the Cruel and Unusual Punishments Clause "applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'" *Graham*, 490 U.S. at 398-399 (quoting *Ingraham* v. *Wright*, 430 U.S. 651, 671 n.40 (1977)). When the Court held in *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), that inmates of an institution for the mentally disabled have a right to personal security protected by due process, it noted, "[i]f it is cruel and unusual punishment [under the Eighth Amendment] to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions." *Id.* at 315-316.

II. THE COURTS HAVE MADE CLEAR THAT THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROTECTS THE RIGHT TO BE FREE FROM WHOLLY UNJUSTIFIED INTRUSIONS ON BODILY INTEGRITY

Respondent was convicted in this case for violating his victims' constitutional right to bodily integrity, protected by the Due Process Clause of the Fourteenth Amendment. J.A. 6-11, Pet. App. 157a. Under the standards we have outlined above, that right has been "made specific" within the meaning of *Screws*. This Court has recognized, in a variety of contexts, a due process right to be free from forcible, wholly unjustified, intrusions on personal bodily integrity. The lower courts have also recognized that right, and have applied it in cases closely similar to this one.

1. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 847 (1992). Certain "attributes of personhood" (*id.* at 851) are recognized as so fundamental that they receive protection under the Due Process Clause as a matter of substantive liberty. At the core of that concept is the right to bodily integrity, free from wholly unjustified deliberate intrusions at the hands of government officials.

The "right of personal security" was recognized by Blackstone as among the core personal rights protected by the common law. See 1 William Blackstone, *Commentaries on the Laws of England* 125-130 (facsimile ed. 1979) (Blackstone).[18] Speaking specifi-

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[18] Much of Blackstone's discussion of the individual's right to personal security concerns the right against arbitrary

cally of the protection afforded by that right to be free from unjustified deprivations of life and limb, Blackstone emphasized that arbitrary deprivations undertaken for impermissible and unjustified reasons were contrary to the Magna Carta's requirement that the sovereign act in accordance with "the law of the land":

> Yet nevertheless [life] may, by the divine permission, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments[.] * * * At present, I shall only observe, that whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical: and that whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the subject is aware of the

deprivations of life and limb. He makes clear, however, that, "the rest of his person or body is also entitled by the *same natural right* to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member." 1 Blackstone, *supra*, at 130 (emphasis added). He also makes clear that the right to personal security is in addition to, and separate from, the right to "the personal liberty of individuals," in the sense of "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." *Ibid.* Thus, it is clear that the personal "liberty" protected by due process includes the right to be free from unjustified assaults, and is not limited to the right to be free from unjustified restraint.

> danger he is exposed to, and may by prudent caution provide against it. The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the highest necessity: and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. "*Nullus liber homo*, says the great charter, *aliquo modo destruatur, nisi per legale judicium parium suorum aut per legem terrae.*"

Id. at 129.

This Court accordingly recognized over a century ago that "[n]o right is held more sacred, or is more carefully guarded, by common law, than the right of every individual to the possession and control of his own person, free from all restraint and interference of others, unless by clear and unquestionable authority of law." *Union Pacific Ry.* v. *Botsford*, 141 U.S. 250, 251 (1891). Although that case was not expressly decided under the Due Process Clause, it clearly recognized that any intrusion on bodily integrity by a government official must be undertaken for a permissible purpose, justified by clear legal authority.[19] See also *ICC* v. *Brimson*, 154 U.S. 447, 479 (1894); *In*

[19] The question presented in *Botsford* was whether a federal court sitting in diversity in a personal injury case had authority to order the plaintiff to undergo a surgical examination. See 141 U.S. at 250-251. This Court has relied on *Botsford* as support for the conclusion that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S. 261, 269, 278 (1990); *id.* at 288 (O'Connor, J., concurring).

re Pacific Ry. Comm'n, 32 F. 241, 250 (C.C.N.D. Cal. 1887) (Field, J.).

This Court has recognized the right to personal security in a variety of contexts. In *Rochin* v. *California*, 342 U.S. 165 (1952), the Court held that due process was violated by the forcible administration of a "stomach pumping" solution to recover evidence swallowed by an arrestee, finding that "[t]his is conduct that shocks the conscience," *id.* at 172. The Court stressed the "general requirement" that "States in their prosecutions respect certain decencies of civilized conduct," *id.* at 173, and avoid "force so brutal and so offensive to human dignity," *id.* at 174.

In *Ingraham* v. *Wright*, 430 U.S. 651 (1977), the Court expressly recognized a due process right to personal security, and concluded that the right was implicated by corporal punishment in public schools. The Court stated that "[t]he liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men,'" *id.* at 673 (quoting *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923)), and it stressed that "[a]mong the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." *Ibid.* & n.41 (citing, *inter alia*, Blackstone).

The Court relied squarely on *Ingraham* in *Vitek* v. *Jones*, 445 U.S. 480, 492 (1980), where it held that compelled treatment of a prisoner in a mandatory "behavior modification" program implicated a liberty interest protected by due process. And in *Youngberg* v. *Romeo*, 457 U.S. 307, 315-316 (1982), the Court, relying on both *Ingraham* and *Vitek*, reiterated that

"the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause."[20]

In a closely related context, the Court has stated that there is a "constitutionally protected liberty interest in refusing unwanted medical treatment." *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990). Justice O'Connor, concurring in *Cruzan*, observed that the liberty interest at issue there "flows from decisions involving the State's invasions into the body," and noted that "state incursions into the body [are] repugnant to the interests protected by the Due Process Clause." *Id.* at 287. And in *Riggins* v. *Nevada*, 504 U.S. 127 (1992), the Court held that the forced administration of antipsychotic medication to a pretrial detainee violated the Due Process Clause. *Id.* at 133-134. The Court stressed there that "forcing antipsychotic drugs on [a

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[20] *Ingraham*, *Vitek*, and *Youngberg* are not distinguishable on the ground that they arose in contexts where the plaintiffs lacked the full measure of liberty enjoyed by free persons generally (schools, prisons, psychiatric institutions). To the contrary, the principal question in those cases was whether those special settings *extinguished* the right to personal security that free persons would otherwise enjoy; the existence of the basic right was unquestioned. In *Ingraham*, for example, the Court noted that, "[b]ecause it is rooted in history, the child's liberty interest in avoiding corporal punishment while in the care of public school authorities is subject to historical limitations," 430 U.S. at 675, and it relied on historically rooted common law privileges and damages remedies to hold that Florida did not deprive school children of their right to personal security without due process of law, *id.* at 674-683. In *Youngberg*, the Court stressed that the right to personal security "is not extinguished by lawful confinement, even for penal purposes." 457 U.S. at 315.

person] is impermissible absent a finding of overriding justification and a determination of medical appropriateness." *Id.* at 135. See also *Washington* v. *Harper*, 494 U.S. 210, 221-222 (1990) (due process liberty interest protects against "unwanted administration" of medical procedures). Most recently, in *Planned Parenthood* v. *Casey*, the Court again held that the Constitution places limits on a state's right to interfere with bodily integrity. See 505 U.S. at 869 (joint opinion) (stressing "the urgent claims of the woman to retain the ultimate control over her * * * body, claims implicit in the meaning of liberty"). "Short of attempting to catalogue every possible factual situation involving an intrusion upon personal security or bodily integrity, it is impossible to see how the * * * Court could have more explicitly stated over the years that violations of that precious right cannot be tolerated in a free and civilized society." Pet. App. 76a (Daughtrey, J., dissenting).

What is clear from the Court's decisions is that intrusions by officials on bodily integrity must, *at a minimum*, be justified by a permissible governmental purpose to satisfy due process. When a constitutionally protected liberty interest is at stake, there must be at least a legitimate basis for its deprivation by state officials. See *Ingraham*, 430 U.S. at 675. As the Court stressed in *Riggins*, an intrusion on bodily integrity by state officials cannot be justified "without making *any* determination of the need for [such a] course or *any* findings about reasonable alternatives." 504 U.S. at 136. Thus, it is clear that a violation by a government official of the right to personal security without *any legitimate reason whatsoever* is an unconstitutional deprivation of liberty without

due process of law. Forcible rape and sexual assault clearly constitute such wholly illegitimate violations.

2. The lower federal courts, following the decisions of this Court discussed above, have squarely and repeatedly held that a state official's intrusion on the body for no permissible purpose (such as a sexual assault) is a violation of the right to bodily integrity protected by the Due Process Clause. In *Stoneking* v. *Bradford Area School District*, 882 F.2d 720, 727 (3d Cir. 1989), cert. denied, 493 U.S. 1044 (1990), the Third Circuit relied on *Ingraham* for the conclusion that "[a] teacher's sexual molestation of a student is an intrusion of the schoolchild's bodily integrity not substantively different for constitutional purposes from corporal punishment by teachers." The court stated that "the constitutional right Stoneking alleges, to freedom from invasion of her personal security through sexual abuse, was well-established" by the early 1980s, 882 F.2d at 726, and it noted that, "[s]ince a teacher's sexual molestation of a student could not possibly be deemed an acceptable practice, as some view teacher-inflicted corporal punishment, a student's right to be free from such molestation may be viewed as clearly established even before *Ingraham*." *Id.* at 727.[21]

Similarly, the Fifth Circuit, in *Doe* v. *Taylor Independent School District*, 15 F.3d 443 (en banc), cert. denied, 115 S. Ct. 70 (1994), held that a teacher's sexual abuse of a student "deprived [the student] of a liberty interest recognized under the substantive due process component of the Fourteenth Amendment."

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[21] As we explain at p. 39 n.20, *supra*, cases like *Stoneking* cannot be distinguished from this one on the ground that they involve schoolchildren.

15 F.3d at 451. The court also found it "crystal clear" that "[n]o reasonable public school official in 1987 would have assumed that he could, with constitutional immunity, sexually molest a minor student." *Id.* at 455.[22]

Other courts have recognized as well the due process right to be free from sexual assault by officials. In *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 479 (9th Cir. 1991), a case involving the "under color of state law" element of Section 1983, the court concluded that the plaintiff's constitutional rights were violated when she was raped by a state welfare official. In *Wedgeworth* v. *Harris*, 592 F. Supp. 155, 159 (W.D. Wis. 1984), the court, relying on *Rochin*, held that a police officer's sexual assault violated the victim's constitutional right to bodily integrity. In *Gilson* v. *Cox*, 711 F. Supp. 354 (E.D. Mich. 1989), the court held that a male inmate stated a claim under Section 1983 based on a female corrections officer physically abusing him by grabbing his genitals and buttocks, and thereby violating his right to be free from sexual abuse. See also *Stacey* v. *Ford*,

[22] See also *Doe* v. *Rains County Indep. Sch. Dist.*, 66 F.3d 1402, 1406-1407 (5th Cir. 1995) (teacher's sexual abuse of student violates due process liberty interest; due process protects "freedom from sexual abuse by persons wielding state authority," and "Supreme Court precedent has ended that precise debate"); *Walton* v. *Alexander*, 44 F.3d 1297, 1302 (5th Cir. 1995) (en banc) (stating, in case involving sexual assault on a student, that "[t]he right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process"); *Wassum* v. *City of Bellaire*, 861 F.2d 453, 454-455 (5th Cir. 1988) ("No one questions the district court's determination that [a police officer] violated [his fellow police officer's] constitutional rights when he brutally raped her.").

554 F. Supp. 8 (N.D. Ga. 1982) (same). Other reported decisions involve prosecutions under Section 242 based on the deprivation of the constitutional right to be free from interference with bodily integrity by sexual assault. See *United States* v. *Contreras*, 950 F.2d 232, 235-236 (5th Cir. 1991) (police officer convicted of violating Section 242 by sexually assaulting a woman he had detained), cert. denied, 504 U.S. 941 (1992); *United States* v. *Davila*, 704 F.2d 749 (5th Cir. 1983) (border patrol officers convicted for coercing sex from two women they had detained); *United States* v. *Brummett*, 786 F.2d 720 (6th Cir. 1986).

In cases involving non-sexual assaults, the courts have also frequently recognized and applied the due process right to be free from wholly unjustified interference with bodily integrity. The leading decision is *Johnson* v. *Glick*, 481 F.2d 1028, 1032, cert. denied, 414 U.S. 1033 (1973), a case involving the beating of a pretrial detainee, in which the Second Circuit, relying on *Rochin*, concluded that, "quite apart from any 'specific' of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law." In *Gregory* v. *Thompson*, 500 F.2d 59, 62 (9th Cir. 1974), which arose out of a magistrate's assault on a person in his courtroom, the court ruled that the case implicated the "right to be secure in one's person * * * grounded in the due process clause of the Fourteenth Amendment."[23] In *Shillingford* v.

[23] The Sixth Circuit had earlier held, in a Section 1983 suit against a juvenile court magistrate alleging a deprivation of liberty arising out of the magistrate's assault on an arrestee, that the magistrate was not entitled to judicial immunity, and had acted under color of state law. *Lucarell* v. *McNair*, 453 F.2d 836 (1972).

Holmes, 634 F.2d 263 (5th Cir. 1981), the court, relying on *Johnson*, concluded that a police officer's assault on a tourist photographing an arrest stated a claim of deprivation of liberty without due process. In *United States* v. *Messerlian*, 832 F.2d 778, 790 & n.20 (3d Cir. 1987), cert. denied, 485 U.S. 988 (1988), a Section 242 prosecution involving the killing of an arrestee while in police custody, the court noted that it had "consistently acknowledged that the Fourteenth Amendment's guarantee of personal security includes protection from unwarranted invasion" by officials.[34] See also *Fernandez* v. *Leonard*, 784 F.2d 1209 (1st Cir. 1986) (intentional shooting by police of kidnapping victim violates right to bodily integrity). And in several cases involving claims of excessive corporal punishment or other unjustified assaults on students by public school personnel, the courts of appeals (including the circuit in which this case arose) have relied on *Rochin*, *Ingraham*, and *Johnson* to find that those claims implicated the right to bodily security protected by the Due Process Clause.[35]

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[34] Other reported cases involving Section 242 prosecutions for non-sexual assaults also gave notice that the Due Process Clause protects the right to bodily integrity against wholly unjustified state intrusion. See *United States* v. *Dise*, 763 F.2d 586, 588-589 (3d Cir. 1985) (beating of psychiatric institution inmates violated their right to personal security and freedom from bodily restraint); *United States* v. *Cobb*, 905 F.2d 784, 788 (4th Cir. 1990) (beating of pre-trial detainee), cert. denied, 498 U.S. 1049 (1991); *United States* v. *Tarpley*, 945 F.2d 806 (5th Cir. 1991) (assault by deputy sheriff on wife's former lover), cert. denied, 504 U.S. 917 (1992).

[35] See *Metzger* v. *Osbeck*, 841 F.2d 518, 520 (3d Cir. 1988); *Webb* v. *McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987); *Garcia* v. *Miera*, 817 F.2d 650, 653-656 (10th Cir. 1987), cert. denied, 485 U.S. 959 (1988); *Hall* v. *Tawney*, 621 F.2d 607, 613 (4th Cir. 1980). *Hall*, in particular, relied on *Rochin* and *Johnson* to conclude that the "right to ultimate bodily security * * * is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process." *Ibid.*

At the time the incidents in this case took place, therefore, there was a clear consensus in the courts that serious assaults by state officials using the power of their office without justification violate the right to bodily integrity protected by the Due Process Clause.[35] And as the courts also have recognized, rape and sexual assault by state officials under color of law violate due process because they are invasions of bodily integrity that can *never* have a permissible justification.

3. The court of appeals believed, however, that respondent could not be convicted under Section 242 for committing sexual assaults under color of law because the jury was told that, to establish a due process violation, the government would have to show that the sexual assaults "shock[ed] the conscience." Pet. App. 18a-19a. The court reasoned that "'[s]hocks the conscience' is too indefinite to give notice of a crime" and "will yield results that depend too heavily on factual particularity of an individual set of events and upon biases and opinions of individual jurors." *Id.* at 19a.

The court of appeals misunderstood the function of the "shock the conscience" language in the jury instructions in this case. See J.A. 186-187. That

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[35] We are aware of only one reported decision after *Ingraham* that may be to the contrary. See *Skinner* v. *City of Miami*, 62 F.3d 344 (11th Cir. 1995) (divided panel holding that "hazing" of a firefighter by his fellow firefighters did not violate his substantive due process rights).

language, drawn from this Court's decision in *Rochin* (see p. 38, *supra*), was to respondent's benefit (and indeed respondent did not object to it, see J.A. 189). The trial court correctly charged the jury that the constitutional right to bodily integrity includes the right "to be free from willful sexual assault." J.A. 186; see also *ibid.* ("Included in the liberty protected by the Fourteenth Amendment is the concept of personal bodily integrity and the right to be free of unauthorized and unlawful physical abuse by state intrusion. * * * Freedom from such physical abuse includes the right to be free from certain sexually motivated physical assaults and coerced sexual battery."). In defining the elements necessary for conviction, the judge instructed, not only that defendant's willful sexual assaults had to be "unjustified," but that they also had to amount to "physical abuse" of a "serious" and "substantial" nature, and that, in addition, defendants abuse must involve either "physical force," "mental coercion," "bodily injury" or "emotional damage." J.A. 186-187. It was not necessary for the government to prove, in addition, that the sexual assaults "shocked the conscience" to obtain a conviction. Since rape or sexual assault by a state official can never have a permissible justification, proof of such a rape or a sexual assault involving actual intrusion onto the victim's body ("sexually motivated physical assaults and coerced sexual battery") is always sufficient to establish a deprivation of a right protected by the Due Process Clause.[27]

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[27] This case therefore does not involve considerations like those in *Rochin*, where the governmental objective (securing evidence of a crime) was legitimate, but the methods were brutal to the point of "shocking the conscience." Cf. *Breithaupt* v. *Abram*, 352 U.S. 432, 435-438 (1957) (compelled blood test does not violate due process); *Johnson* v. *Glick*, 481 F.2d at 1033. Language similar to "shock the conscience" is used in other criminal law contexts to identify sanctionable conduct. For example, the basic Fourth Amendment inquiry in cases charging police officers with excessive force is whether the officers acted with objective reasonableness under the circumstances. *Graham* v. *Connor*, 490 U.S. at 395-397. Juries in such cases prosecuted under Section 242 must distinguish "reasonable" from "unreasonable" force. See also *Hudson* v. *McMillian*, 503 U.S. 1, 8-10 (1992) (objective component of Eighth Amendment inquiry must look to "contemporary standards of decency," and use of force must not be "of a sort 'repugnant to the conscience of mankind' "); *United States Gypsum*, 438 U.S. at 438-443 (antitrust laws may form basis of criminal violations despite "indeterminacy of the Sherman Act's standards"); *Miller* v. *California*, 413 U.S. 15, 30-33 (1973) (obscenity may be punished only if jury finds it violates "contemporary standards of decency").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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